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IN THE

Supreme Court of the United States

NO. 706 OCTOBER TERM, 1968

WILLIAMS AND COMPANY, INC., Appellant
v.
THE CITY OF PITTSBURGH and SCHOOL DISTRICT OF PITTSBURGH, and DAVID A. SMITH, City-School Treasurer, Appellees

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA AT NOS. 38 AND 39 MARCH TERM, 1968.

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16, paragraphs 1(b) and 1(d) of the Rules of this Court, the City of Pittsburgh, School District of Pittsburgh, and David A. Smith, City-School Treasurer, as Appellees, move that the appeal be dismissed, or, alternatively, that the judgment of the Supreme Court of Pennsylvania be affirmed, on the following grounds:

1. The appeal does not present a substantial federal question.

2. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

3. The judgment rests upon an adequate non-federal basis.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A.

The Statutes

This appeal raises the question of the application of certain provisions of the mercantile tax laws of the City of Pittsburgh and School District of Pittsburgh. The City imposes a tax on mercantile sales under the provisions of a local ordinance enacted by virtue of its authority found in the Acts of Assembly of Pennsylvania, Act of June 25, 1947, P.L. 1145, as amended, 53 Purdon's Pa. Statutes §§ 6851 *et seq.* The School District imposes its tax by authority of the Act of June 20, 1947, P.L. 745, as amended, 24 Purdon's Pa. Statutes §§ 582.1 *et seq.*

The application of the City and School District laws and regulations are identical in all material respects except as to the tax rate. The retail tax rate — 2 mills for the City; 1 mill for the School District — is double the wholesale tax rate, both of which are computed upon the gross volume of business. On the other hand, the rate for brokers — 1 mill for the City; ½ mill for the School District — is levied only upon gross commissions. Because of these differences, the proper classification of the sales in question is important both to the Appellant and the Appellees.

As to both taxing acts, an exemption is granted to manufacturers with respect to those goods, wares and merchandise of their own produce or manufacture.

The State Statutes Involved and the Nature of the Case.

The acts and ordinance provide for the self-assessment of the tax due by the taxpayer and the filing of appropriate mercantile tax returns with the taxing bodies. Appellees have the authority to examine the returns and make reassessments in accordance with the laws relating to mercantile transactions.

B.

The Proceedings Below

The Appellant had filed mercantile tax returns for the years 1960 and subsequent and paid the tax shown due thereon. Appellees reexamined Appellant's books and records and claimed additional mercantile taxes on the grounds that certain transactions previously reported by Appellant as being "wholesale sales" should have been reported, and the tax paid, as "retail sales".

Appellant thereupon paid the additional taxes under protest and filed appeals in the County Court of Allegheny County, Pennsylvania, contending, *inter alia,* that its sales filled through direct shipment from its suppliers to its customers were either wholesale or brokered transactions, rather than retail sales. The County Court agreed with Appellant's contention and held that the so-called "mill direct" sales were deemed to be brokered transactions. Upon appeal to the Supreme Court of Pennsylvania, the decision of the lower court was reversed. *Williams and Company, Inc. v. City of Pittsburgh,* 430 Pa. 509, 244 A. 2d 37 (1968).

II.

ARGUMENT

A. The Case Presents No Substantial Question Not Previously Decided by This Court.

Since the case of *American Sugar Refining Co. v. Louisiana,* 179 U.S. 89, 21 S. Ct. 43, 45 L.Ed. 102 (1900), it has been well established that state statutes in imposing a license tax upon persons and corporations while exempting from such tax certain classes upon the general theory of a manufacturer's exemption present no question under the Constitution of the United States and that it is proper governmental policy not only to classify subjects differently for purposes of taxation but also to exempt producers from taxation upon the methods employed by them to put their product on the market.

Appellant here seeks to assert a federal question merely because it finds itself having to compete with its own suppliers, some of whom enjoy the exemption afforded manufacturers under the acts here involved as to those goods which the vendor has, in fact, produced himself. Your Honorable Court has on numerous occasions refused to invalidate a tax solely on the basis of the economic disadvantage where the classification was not otherwise arbitrary. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959); *Union Bank & Trust Co. v. Phelps,* 288 U.S. 181, 53 S. Ct. 321, 77 L. Ed. 687 (1933); *State Bd. of Tax Comm'rs of Indiana v. Jackson,* 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931); *Stebbins v. Riley,* 268 U.S. 137, 45 S. Ct. 424, 69 L. Ed. 884 (1925); *Heisler v. Thomas Colliery Co.,* 274 Pa. 448, 118 A. 394, 24 A.L.R.

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The Pennsylvania statutes here involved are patterned directly on the ruling in the *American Sugar Refining* case, *supra*, in that the Commonwealth has seen fit, in its legislative wisdom, to afford an exemption to certain classes of merchants whose goods and wares are products of their own manufacture. The fact that the Appellant is required to pay a tax at the retail rate on that 20% of his business which, for reasons of his own convenience, he elects to ship directly from his supplier to his customer does not give rise to any substantial federal question.

In point of fact, the Record is clear that the economic disadvantage of which Appellant complains is not borne out. The Appellant conceded, at time of trial, that it is virtually impossible to attribute the fractional differences between competitor's prices to any one cost factor and that, further, the mercantile tax here complained of would be, at best, just one of many factors influencing Appellant's competitive position. (R. 85a-86a).

The price discrimination cases referred to by Appellant at page 10 of its Jurisdictional Statement have no relevance here, for the issue is not one of the applicability of § 2(a) of the Robinson-Patman Act but rather the reasonableness of a classification established within state mercantile license legislation applicable

alike to all merchants seekng to do business within the taxing district.

B. The Judgment Rests Upon an Adequate Non-Federal Basis.

The Supreme Court of Pennsylvania specifically observed that the sole subject of the dispute was the proper classification for mercantile tax purposes of certain sales filled through direct shipment from Appellant's suppliers to its customers. The lower state court had determined that such "mill direct" sales were brokered transactions. On appeal, the Supreme Court of Pennsylvania reversed, holding that the sales involved were retail transactions.

In the Commonwealth of Pennsylvania, the authorities are uniform in holding that a vendor is one who buys in order to sell[1], and that tripartite sales transactions, as here involved, are not at all uncommon, invariably resulting in a finding of retail sales[2].

It is respectfully submitted that the Supreme Court of Pennsylvania based its judgment expressly upon a substantial and sufficient non-federal basis, and the Su-

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1. *Brown & Zortmann Machinery Co. v. City of Pittsburgh,* 375 Pa. 250, 100 A.2d 98 (1953); *Norris Brothers v. Commonwealth,* 27 Pa. 494 (1856); *Commonwealth v. Thorne, Neale & Co.,* 264 Pa. 408, 107 A. 814 (1919).

2. *Brown & Zortmann Machinery Co. v. City of Pittsburgh,* supra, n. 1; *The Air Scale Co. v. Nock Co., Inc.,* 98 Pa. Super. 400 (1930); *Commercial Credit Company v. Girard National Bank,* 246 Pa. 88, 92 A. 44 (1914); *Commonwealth v. Banker Brothers Co.,* 38 Pa. Super. 101, aff'd, 222 U.S. 210 (1911).

preme Court of the United States should not take jurisdiction to review the judgment. *Black v. Cutter Laboratories,* 351 U.S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956), rehearing denied 353 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69; *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965).

CONCLUSION

We respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, that the appeal does not present a substantial federal question, and that the judgment rests upon an adequate non-federal basis. Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Pennsylvania.

Respectfully submitted,

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